

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
800 K Street, NW, Suite 400-N  
Washington, DC 20001-8002

(202) 693-7300  
(202) 693-7365 (FAX)



Issue date: 28Sep2001

**DATE:**

**CASE NO. 2001-INA-105**

**In the Matter of:**

**MR. & MRS. FRED HOWERY**  
**Employer**

**On Behalf of:**

**JESUSANA BONZON DEL ROSARIO**  
**Alien**

Appearance: Steven Elias, Esquire  
For the Employer

Certifying Officer: Richard E. Panati  
Philadelphia, PA

Before: Holmes, Vittone, and Wood  
Administrative Law Judges

JOHN C. HOLMES  
Administrative Law Judge

**DECISION AND ORDER**

This case arose from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for labor certification. The certification of aliens for permanent employment is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656.

Under §212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely

affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the Appeal File ("AF"), and any written arguments of the parties. 20 C.F.R. §656.27(c).

### **Statement of the Case**

On July 17, 1997, the Employer, Mr. & Mrs. Fred Howery, filed an application for labor certification to enable the Alien, Jesusana Bonzon Del Rosario, to fill the position of Cook (AF 44). The job duties for the position, as stated on the application, are as follows:

Will prepare and cook variety of dishes like American, Chinese, Italian and Filipino dishes for the family, guests and during parties. Purchase ingredients to be used in cooking in consultation with the employer. Cleans utensils and cutleries (sic) used in cooking. Maintains the kitchen clean at all times.

(AF 44). The stated job requirements for the position are as follows: a 6<sup>th</sup> grade education; and, two years of experience in the job offered (AF 44).

The CO issued an initial Notice of Findings ("NOF") on February 9, 1999 (AF 37-39). Following the Employer's first rebuttal (AF 31-36), the CO issued a second NOF on June 9, 1999 (AF 28-30), in which he proposed to deny certification on the grounds that the job opportunity did not appear to be a bona fide one which is open to U.S. workers, in violation of §656.20(c)(8). The Employer submitted its second rebuttal on or about July 12, 1999 (AF 11-27). The CO found the rebuttal unpersuasive, and issued a Final Determination, dated October 8, 1999, denying certification on the same basis (AF 8-10). On November 2, 1999, the Employer sought reconsideration (AF 3-7), but the CO denied the reconsideration request on December 7, 1999 (AF 2). Subsequently, the Employer appealed the Final Determination (AF 1), and the CO forwarded this matter to the Board of Alien Labor Certification Appeals. Under cover letter, dated May 24, 2001, the Employer filed a brief, together with new evidence which we cannot consider.

### **Discussion**

In the second Notice of Findings, the CO questioned whether the job opportunity is a bona fide

one open to U.S. workers, or whether it was simply created for the benefit of the Alien's immigration status. The CO stated, in pertinent part:

**JOB OPPORTUNITY MUST BE CLEARLY OPEN TO U.S. WORKERS.**

Section 656.20(c)(8) requires that the job opportunity be clearly open to any qualified U.S. worker. This regulation means that the job opportunity must be bona fide, and that the job opening as described on Form ETA 750, actually exists and is open to U.S. workers.

Your application contains insufficient information to determine whether the position of Domestic Cook actually exists in your household or whether the job has been created solely for the purpose of qualifying the alien as a skilled worker under current immigration law.

Under the immigration law, the number of immigrant visas available to "unskilled workers" (aliens granted labor certification in occupations requiring less than two years of experience) is very limited. The visa waiting period for unskilled worker visas now exceeds seven years. This lengthy waiting period makes immigrant visas virtually unavailable for unskilled workers. On the other hand, there is no current waiting period for most immigrant visas in the "skilled worker" category (aliens granted labor certification in occupations requiring at least two years of experience).

According to the Directory of Occupational Titles (DOT), almost all household positions are classified as "unskilled" because the occupations require much less than two years of training, education and/or experience for proficiency. For example, 30 days to three (3) months is required for a Houseworker. The occupation of Domestic Cook is an exception. Because the occupation of Domestic Cook can require one or two years for proficiency, it is considered to be a "skilled worker" under the immigration law.

Your rebuttal must explain why the position of Domestic Cook in your household should be considered a bona fide job opportunity rather than a job opportunity that was created solely for the purpose of qualifying the alien as a "skilled worker." Your rebuttal evidence, at a minimum, must include responses to the following questions. In addition, you must provide the requested documentation.

*Your responses, documentary evidence, and all other relevant factors, will be evaluated to determine whether the position of Domestic Cook actually exists in your household. The adequacy of the documentation will be key to the evaluation of your application because little weight will be accorded to conclusory statements. Merely answering all the questions does not insure approval of the*

*application.*

(1) State the number of meals prepared per day and per week; the length of time required to prepare these meals each day and each week; and the number of people for whom such meals are prepared;

(2) Provide the work and/or school schedules of all persons residing in the household.

(3) How frequently do you entertain? Describe in detail how often you entertained in the *twelve (12) months* immediately preceding the filing of the application. List the dates of the entertainment, the number of guests entertained, the number of meals served, etc. To what extent will the Domestic Cook be involved in preparing food for guests?

(4) If there are pre-school and school-aged children residing in the household, please answer the following questions:

a. How will your child(ren) be cared for when both parents are absent from the home and the alien is fully engaged in preparing meals?

b. Who will care for your child(ren) during the alien's scheduled time off?

c. Will the alien be required to perform functions such as child care, general cleaning or other non-cooking functions? If not, how are those functions accomplished in the household?

(5) Describe any special dietary circumstances of the household, e.g., nutritional requirements. All special dietary requirements must be accompanied by a physician's statement.

(6) What percentage of the employer's disposable income will be devoted to paying the alien's salary? Your answer must be supported by providing a copy of your Federal Income Tax Return for the immediately preceding calendar year.

(7) If there are other domestic workers employed in the household, please list all positions, duties, and corresponding weekly hours of employment.

(8) Has the household ever before employed a Domestic Cook? If not, what circumstances led to the current job offer?

(9) If applicable, when the alien was initially hired, what were the alien's duties, and what wages were paid?

(10) What is the alien's training and experience as a Cook? To what extent has that training and experience involved cooking in a domestic situation?

(11) How did the alien learn of the job offer?

(12) What is the nature of the relationship between the alien and the employer (familial, friendship, or any other special connection)?

(AF 29-30).

The Employer's rebuttal to the second NOF consisted of a letter by the Employer, dated July 9, 1999, which contained responses to the questions posed by the CO (AF 12-17) and a copy of Employer's 1998 Federal Income Tax Returns (AF 18-27).

In the Final Determination, the CO found that the Employer failed to satisfactorily rebut the deficiencies cited in the second NOF (AF 8-10). In pertinent part, the CO stated:

In summary, your rebuttal letter indicates that the Domestic Cook will prepare three meals a day for a family of four - two adults and two children. On the days that you are out of town, which is about 2 days a week, the Cook has to prepare foods only for three people. Breakfast and dinner are served at home; however, lunch during the weekdays must be packed for taking to school or work for your husband and children. When you don't travel, you will stay in your home office and eat lunch at home.

The estimated amount of time needed to prepare these meals is approximately 1 hour for breakfast (prepared the night before), 1 hour for lunch, 1-2 hours for dinner, 2 hours for shopping and travel, and 2 hours for serving and cleaning up. The dinner party preparations could take 2-3 hours depending on the number of guests. The occasional weekend parties sometime take a full day of preparation, again depending on the number of guests.

Your husband starts work at 7:30-8:00 a.m. And usually leaves work at around 5:30-6:00 p.m. to pick up the children from school/camp. You also mentioned that you have a more flexible schedule since your job requires a combination of travel and telecommuting from your home office. Depending on meeting schedules with your clients, you leave the house sometimes as early as 5:00 a.m. or as late as 10:00 a.m. and return as early as 2:00 p.m. or as late as 9:00 p.m. You mentioned that there are days when you have business travel that require you to be away from home and there

are some days that you stay in the home office and spend the entire day on conference calls or working in your home office.

In your rebuttal, you state that you entertain on an average of three times a month dinner guests or host overnight guests. The number of dinner guests vary from two to twelve, while overnight guests usually is only one or two people.

You state that the children in your household are school aged. They both attend school on a full day schedule including extended day care in the evening. School days are 8:30 a.m. to 3:30 p.m. The extended day care is open until 6 p.m. in the evening. During the summer they attend full-day summer camp at the local YMCA beginning at 7:00 a.m. and ending at 5:30 p.m. When they are at home at least one parent will be home to take care of them.. During the time the cook is working in your home, the children are either not present, or they are cared for by at least one parent.

You state that the Cook will not be expected to perform child care, general cleaning or other non-cooking functions. She will be expected to market, prepare and cook food, serve meals, and clean the kitchen area and utensils she uses. You also stated that you and your husband have always done the day-to-day general household maintenance and cleaning duties.

You state that no Domestic Cook was employed before. However, since your job has changed to a Sales and Marketing function in 1996, it has been necessary for you to entertain, travel, and occasionally host house guests. Therefore, the additional demands of entertaining have made a significant impact on the amount and type of cooking required and it has become necessary to seek a full-time Cook. You also state that the alien had worked for you part-time, approximately 10 hours a week as a cook and sometimes as a babysitter.

The details you provided do not establish that there is a bonafide position for a Domestic Cook in your household. Rather, the evidence shows that it is more likely that the alien will be employed as a General Houseworker than a Domestic Cook. Your rebuttal evidence does not show that you entertain frequently or that the alien will be involved on a full-time basis preparing meals for family members to consume. Most family members are outside the home working or attending school for the greater part of the alien's daily work schedule. Consequently, while the alien may cook some meals, it is implausible that the alien will be engaged as a full-time Domestic Cook because there is no one at home to eat most of the meals that the alien supposedly will prepare and serve. Even though you have stated that your children do not require child care; nevertheless, they are still attending school, and it seems apparent that the household employee (the "cook) must also be involved in child care during the week,

on school holidays and when no one else is available.

**FINAL DETERMINATION:** The application for **Jesusana Del Rosario** remains in violation of Federal regulations and certification is denied accordingly.

(AF 9-10). We agree.

The issue of whether the job opportunity for a Domestic Cook is a *bona fide* offer of employment under §656.20(c)(8) was analyzed by the Board in *Carlos Uy III*, 1997-INA-304 (Mar, 3, 1999)(*en banc*). In *Uy*, the Board adopted a “totality of circumstances” test for consideration of whether an application was based on a mis-characterization of the position (*i.e.*, Is the Employer mis-classifying the position as “Domestic Cook,” which is a “skilled” position, as opposed to classifying the job as some other domestic service position, such as “General Houseworker” or “Child Monitor,” which are “unskilled” positions, in order that the alien can avoid long delays in obtaining a visa).

As stated in *Uy*: “The heart of the totality of the circumstances analysis is whether the factual circumstances establish the credibility of the position. In applying the totality of the circumstances test, the CO’s focus should be on such factors as whether the employer has a motive to misdescribe a position; what reasons are present for believing or doubting the employer’s veracity or the accuracy of the employer’s assertions; and whether the employer’s statements are supported by independent verification.”

In the instant case, based on the record presented on appeal, Employer’s rebuttal consisted largely of its own statements and a copy of a tax return. Mrs. Howery’s statements addressed each of the specific questions asked by the CO, and, if credible, would establish a full-time work schedule for the cook position.

Arrayed against the credibility of the position description are a great number of factors. As the CO noted, there is a strong motive for employers to describe a skilled position when applying for labor certification in order to avoid a long wait for a visa. Moreover, Mrs. Howery’s statements are self-serving in nature and little supporting documentation was presented. Furthermore, as discussed below, obvious reasons exist for questioning the veracity and accuracy of the information supplied by Mrs. Howery.

Based upon our review of the record, we agree with the CO’s determination, and conclude that the Employer’s contention that the job offered a bona fide, full-time, Domestic Cook position open to U.S. workers, is inherently implausible.

In making this determination, we first note that the Statement of Qualifications of Alien, dated July 11, 1997, reveals that the Alien has worked for the Employer since December 1993. The job title at that time was as follows: “Cook & Babysitter.” (AF 47). At that time, the Alien’s job duties were

described as follows: “Takes care of two children ages 3 ½ & 6 yrs. old. Prepares, cooks and serves American, Chinese and Filipino dishes for the family’s meal in the evening.” Thus, the Alien not only prepared and cooked dinner for the Employer, but also provided child care for their two children. Yet, the Alien only worked 10 hours per week (AF 47).

In contrast, the Employer alleges that in the “new” job, the Alien will not have any babysitting or child care duties. Furthermore, the Employer asserts that the Alien also will not perform general housework. Yet, the Employer purports that there now is a job opening for a *full-time, domestic cook*, despite the fact that most of the family members are not even home during most of the day; and, the extent of the Employer’s alleged entertainment is fairly limited.

It is well settled that where an alien has worked part-time for the employer performing the same duties as listed for the petitioned position, it may be difficult for the employer to prove its need for a full-time employee. In *Howard Hewett*, 1988-INA-371 (June 12, 1989), an employer failed to demonstrate the existence of full-time work where the alien had worked for the employer only eight hours per week for the prior three years. Similarly, in *Randy Auerback*, 1988-INA-103 (Apr. 7, 1988), an employer failed to document the need for a full-time houseworker where the alien had performed the same job duties for the employer on a part-time basis and the employer submitted no documentation to substantiate his allegation of additional duties. *See also, King’s Gallery*, 1991-INA-290 (Aug. 12, 1992). Furthermore, in *Pradeep K. Gupta*, 1994-INA-213 (June 5, 1995), the Board held that the employer did not establish that the position of cook was full-time, where the family is not at home during breakfast and lunch. In contrast, labor certification was granted for a child tutor position as being full-time, where the position involved general child care duties, as well as teaching duties. *Mr. & Mrs. Stanley Tee*, 1994-INA-10 (June 27, 1995).

Although the part-time duties and the duties for the petitioned job are not identical, the cooking duties regarding dinner are similar. Furthermore, the time spent preparing breakfast and lunch is relatively minimal; and, the entertainment schedule is quite limited. Moreover, although the Alien’s cooking duties are allegedly expanded to include breakfast and dinner, most of the family members are not even at home for the latter. Thus, the Employer has not satisfactorily explained or documented how these “additional” duties warrant an increase in the Alien’s hours from 10 to 40 per week. This is particularly true where, as here, the Alien’s 10 hours of part-time work had included child care duties. Yet, the Employer insists that the Alien will no longer be performing such duties in the full-time domestic cook position.

In summary, we find that the credible evidence precludes a finding of a full-time, domestic cook position. Based upon the Alien’s prior work history for the Employer, the schedules of the Employer and family members, and Employer’s assertion that the Alien will not perform any housekeeping or child care services, we find that the Employer has failed to establish a bona fide *full-time* position. On the other hand, if, in fact, the Alien performs other household or child care duties, then, perhaps the position is full-time, but it has been mis-classified. In any event, we agree with the CO’s determination

that the Employer has failed to establish a bona fide, full-time, domestic cook position which is clearly open to U.S. workers. Therefore, labor certification was properly denied.

**ORDER**

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

A  
JOHN C. HOLMES  
Administrative Law Judge

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, N.W., Suite 400  
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.

It may have been more appropriate for the CO to cite 20 C.F.R. §656.3, which specifies that the term “*Employment*,” in pertinent part, “means permanent full-time work.” Nevertheless, we find that the CO clearly placed the Employer on notice of the underlying deficiency and provided satisfactory corrective instructions.